Dechert LLP

Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
+1 215 994 4000 Main
+1 215 994 2222 Fax
www.dechert.com

STEPHEN D. BROWN

stephen.brown@dechert.com
+1 215 994 2240 Direct
+1 215 655 2240 Fax

April 5, 2012

VIA HAND DELIVERY

Amy B. Ginensky, Esq.
Pepper Hamilton LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799

Re: Junior Doe, et al. v. Allentown School District, et al.
No. 2:06-cv-01926-PD

Dear Ms. Ginensky:

Enclosed please find the redacted summary judgment briefing that we sent to Judge Diamond on March 28, 2012. As previously discussed, these redactions are necessary to protect the strong privacy and personal interests of all minor parties in this case. We are hopeful that the enclosed briefing will satisfy your client's needs.

Sincerely,

Stephen D. Brown

SDB/spm

Enclosures

cc: John E. Freund, III, Esq. (via email w/o enclosures)
James L. Pfeiffer, Esq. (via email w/o enclosures)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE I, et al., a minor, by and through his parents and natural guardians, Plaintiffs,	:	No. 06-1926
v.	:	THE HONORABLE PAUL S. DIAMOND
THE ALLENTOWN SCHOOL DISTRICT, et al. Defendants.	:	

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, ALLENTOWN SCHOOL DISTRICT, DR. EVA HADDON,BRADLEY CARTER AND KIM CECCATTI

TO BE FILED UNDER SEAL AS PER THE ORDER AND STIPULATION FOR THE CONFIDENTIAL TREATMENT OF DOCUMENTS AND DEPOSITIONS, APRIL 14, 2008, DOCKET NO. 92

John E. Freund, III, Esq.
Counsel for Appellee
Atty ID: 25390
King Spry Herman Freund & Faul, LLC
One West Broad St., Suite 700
Bethlehem PA 18018
(610) 332-0390
Attorney for Defendants
Allentown School District, Dr. Eva Haddon,
Bradley Carter and Kim Ceccatti

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CONFIDENTIAL TREATMENT OF DOCUMENTS AND DEPOSITIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE I, et al., Plaintiffs,	:	No. 06-1926
	:	The Honorable Paul S. Diamond
v.	:	
THE ALLENTOWN SCHOOL DISTRICT, et al., Defendants.	:	

BRIEF IN SUPPORT OF SUMMARY JUDGMENT OF DEFENDANTS ALLENTOWN SCHOOL DISTRICT, DR. EVA HADDON, BRADLEY CARTER AND KIM CECCATTI

Defendants Allentown School District ("ASD"), Dr. Eva Haddon ("Haddon"), Bradley Carter ("Carter") and Kim Ceccatti ("Ceccatti")by their counsel, King, Spry, Herman, Freund & Faul, LLC, move this Honorable Court to enter summary judgment in their favor and in support thereof submit the following memorandum of law:

I. FACTS/PROCEDURAL HISTORY

Plaintiffs have brought the present action seeking damages pursuant to Title IX of the Education Act, 20 U.S.C. §1681 and for civil rights violations under 42 U.S.C. §1983, specifically their constitutional rights to bodily integrity[1] guaranteed under the the Due Process Clause of the

[1] In September 2006, ASD Defendants filed a motion to dismiss seeking to dismias all claims made in Plaintiff's Amended Complaint. In his opinion of September 21, 2007, the Honorable Thomas M. Golden dismissed with prejudice Equal Protection claims against ASD Defendants under Counts II, III and IV.

While Judge Golden denied Defendants motion to dismiss with regard to the Due Process claims, his order granted Defendants "leave to renew in the form of a motion for summary judgment after discovery is completed." Judge Golden dismissed all individual ASD Defendants in their official capacities. Judge Golden stated that "Any defendant who is a state official sued in his or her individual capacity may reassert a qualified immunity defense in the form of a motion for summary judgment after discovery is completed." Judge Golden also dismissed with prejudice all claims against ASD Defendants under 42 U.S.C. §§1981, 1985 and 1986. (Docket #79).

Fourteenth Amendment. (Third Amended Complaint ("Comp.") ¶75). In their complaint, Plaintiffs allege of five(5) minor Plaintiffs took place in various bathrooms of Central Elementary School ("Central") in the Allentown School District. (Third Amended Complaint ¶40-64). Plaintiffs' allege these incidents were perpetrated by another student enrolled at Central, identified as .

Defendant Dr. Eva Haddon was, at all relevant times, the principal at Central Elementary School where Plaintiffs alleges the assaults took place. (N.T. Haddon 21). Defendant Bradley Carter was, at all relevant times, the Assistant Principal at Central. (N.T. Carter 15). Defendant Kimberly Ceccatti was, at all relevant times, the Guidance Counselor at Central. (N.T. Ceccatti 16, 19). All other individual ASD Defendants have been dismissed from this case by agreement of counsel. (Docket #241).

Summary of Argument

The record facts in this case read most favorably to the Plaintiffs reveal that over a period of approximately four months in the school year 2003-2004 there were five isolated incidents occurring in boys' lavatories of the Central Elementary School in which

younger boys –

Each incident was very brief and no victim experienced a repeated incident. None of the victims knew their assailant. All of the victims testified that nothing like this had ever happened to them before at Central and never happened again.

The first incident alleged was made known only to two teachers. The second incident was made known to the assistant principal who made reasonable efforts to identify the perpetrator without success. The third and fourth incidents were reported to the guidance counselor and ultimately building administration on the same day, February 5, 2004. As a direct result of the February 5th incidents, the suspected perpetrator was placed on a "bathroom plan" requiring that he be accompanied to the bathroom by an adult.

On March 16, got into an altercation with another student. He was suspended and was supposed to be sent home but his parents could not be reached to pick him up. Instead, the Assistant Principal placed him in the detention area. Because of a lack of space, the detention area was located in the basement in a small hallway that transected a long a central corridor. Off this small hallway was another short hallway leading to a boy's lavatory. At that time there were approximately five students in the detention area. Detention was monitored by Jerald Brown, a teacher on a temporary contract. Brown, a former professional basketball player, said his size and demeanor commanded special respect from the kids.

On the same day a March snowstorm had resulted in an early school closing. As elementary teachers rushed to get their students ready for early dismissal, asked his classroom teacher's permission to go to the boys' room. Because of the early dismissal, the teacher varied from the usual practice of group bathroom breaks and

None of the victims suffered any physical injury and none had any diagnosable emotional injury. No direct evidence of loss of educational opportunity appears in the record.

Plaintiffs now seek damages against Allentown School District and three remaining individual defendants. Only two theories of liability are left to Plaintiffs. As to Allentown School District and the individuals, Plaintiffs claim 14th Amendment Due Process violation on a State-created Danger Theory. Against the District only, Plaintiffs seek liability for violation of Title IX on the basis of student on student harassment as per Davis v. Monroe Bd. of Ed., 526 U.S. 629, 643, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). Both of these claims must fail for similar reasons – the record as well as Plaintiffs' claims are based upon acts of omission, not commission. Specifically, the record does not support an affirmative act on the part of the Allentown School District Defendants, that a reasonable jury could conclude caused a constitutional harm or actionable harassment. Nothing in the record, including the opinions of Plaintiffs' liability experts demonstrate facts or theories that could support findings of deliberate indifference on the part of the Allentown

School District defendants.

On the question of "notice", the record simply does not support actual knowledge of Allentown School District for the first incidents. Knowledge of harassment by teachers or even guidance counselors is not sufficient to attribute actual knowledge to the School District under Third Circuit Law. Even acknowledging actual notice before the last incident , the single episodic nature of the isolated incidents and the absence of any pattern of repetition of incidents against a single victim, would not put a reasonable educator on notice that harassment was of a severe and pervasive or systematic nature so as to trigger a Title IX qualifying response.

Finally, with regard to the Title IX claim, the record fails to demonstrate any actual loss of educational benefit for any of the five Plaintiffs. Thus, three parts of the four part test set out by Davis are not met by this record. Defendants admit that Allentown School District receives federal funds. Overall, the record before the Court on summary judgment does not come close to the high threshold the Supreme Court requires before monetary liability under Title IX can be assessed against public schools for student on student sexual harassment. Plaintiffs claim under the State Created Danger Doctrine must likewise fail because neither the record facts nor the theories put forth by Plaintiffs experts can identify an affirmative act by ASD that caused constitutional injury. The perfect storm of circumstances that saw the breakdown of the bathroom plan for on March 16th cannot be reasonably considered as the deliberately indifferent conduct required before a state actor will be held legally liable for a constitutional violation.

The facts of this record do not rise to either a violation of the 14th Amendment's Due Process clause or a violation of the funding recipient's obligations under Title IX.

STATEMENT OF UNDISPUTED RECORD FACTS

The direct record evidence shows the following with regard to each individual Plaintiff[2]::

Junior Doe I - ( )

Junior Doe III - ( )

2

3.

Junior Doe V - (.)[4]

4

5

Wright traveled to Central Elementary to talk to about the allegations on February 24th, 2004. (Exhibit p-122 at PCT 2/24/04;N.T. Wright 373). Ceccatti was present during the meeting. (Exhibit p-122 at PCT 2/24/04). During their meeting on February 24, 2004, Ceccatti again reiterated that the School was taking precautions by not allowing to go the bathroom alone and that he was escorted from place to place. (Exhibit p-122 at PCT 2/24/04).

Junior Doe II - ( )

Bathroom restrictions were put in place for after the reported incidents on February 5, 2004 occurred. (Exhibit P-122 at PCT 2/9/04 attached to N.T. Wright; N.T. Wright 372, 375-376; Exhibit P-122 at PCT 2/12/04; Exhibit P-122 at PCT 2/24/04; Appx. #29).

Junior Doe IV - ( )

[6]The terms "time-out" room and "in-school" suspension room are terms testified to and used interchangeably by the witnesses.

7

In response to the incident, ASD formed a Safety Task Force and the time out area was moved to a more visible part of the hallway. (N.T., Part I, 58, 92).

Deborah Hartman was the Director of Special Education for the Allentown School District at all relevant times. (N.T. Hartman10).

Plaintiffs' suffered no educational deprivation

Junior Doe I- ( ) - The record lacks any evidence that experienced any deprivation of educational opportunity as a result of this incident.

Junior Doe III - ( ) - The record contains no evidence that experienced any deprivation of educational opportunity as a result of this incident.

Junior Doe V - ( ) - The record shows no evidence that experienced any deprivation of educational opportunity as a result of this incident.

Junior Doe II - ( ) - The record shows no evidence that experienced any deprivation of educational opportunity as a result of this incident.

Junior Doe IV - ( ) - The record shows no evidence that experienced any deprivation of educational opportunity as a result of this incident.

II. QUESTIONS PRESENTED

A. WHETHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT WHERE PLAINTIFFS HAVE FAILED TO ESTABLISH A CLAIM UNDER TITLE IX?

Suggested Answer: Yes.

B. WHETHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT WHERE PLAINTIFFS HAVE FAILED TO ESTABLISH A CLAIM UNDER 42 U.S.C. §1983?

1. WHETHER INDIVIDUAL DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY

Suggested Answer: Yes.

III. ARGUMENT

SUMMARY JUDGMENT STANDARD

The standard for summary judgment is well set.[8]

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[8]In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.C.P. 56(c); Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247, 91 L.Ed. 2d 202, 106 S.Ct. 2505 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of the case are "material". Anderson, 477 U.S. 242, 248, 91 L.Ed.2d 202, 106 S.Ct. 2505. All reasonable inferences from the record are drawn in favor of the non-movant. *See id.* at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. *See* J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990)(citing Celotex Corp. v. Catrett, 477 U.S.

A. PLAINTIFFS FAIL TO ESTABLISH A CLAIM UNDER TITLE IX: THE SCHOOL DISTRICT HAD NO ACTUAL KNOWLEDGE, WAS NOT DELIBERATELY INDIFFERENT AND PLAINTIFFS HAVE NOT SHOWN ANY DEPRIVATION OF EDUCATIONAL BENEFIT

In Count II of Plaintiffs' Third Amended Complaint against Defendant ASD, Plaintiffs allege violations of Minor Plaintiffs' rights under Title IX for allegedly permitting student on student sexual harassment of each of the Plaintiffs. (Third Amended Complaint ¶80-97). Plaintiffs contend that the acts committed by upon the Plaintiffs were "so severe, pervasive and objectively offensive to prevent Plaintiffs as victims from access to educational opportunities and benefits..." (Third Amended Complaint ¶91). The record evidence does not support Plaintiffs' claims.

The development of Title IX indicates a high standard for liability based upon institutional sex discrimination

Title IX requires that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Under Title IX's enforcement framework, an agency may not bring enforcement proceedings until it has "advised the appropriate person or persons of the failure to comply with the requirement and had determined that compliance cannot be secured by voluntary means." 20 U.S.C. § 1682; see also 34 C.F.R. § 100.8(d).

Title IX was enacted as a funding statute to provide girls and women with equal access to

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317, 323, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986)), *cert. denied*, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Ed. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borought of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

education.[9] Recently, the United States Supreme Court recognized an implied right of action, with the possibility of money damages, in cases involving a teacher's sexual harassment of a student. Franklin v. Gwinnett County Public Schs., 503 U.S. 60 (1992); Cannon v. University of Chicago, 441 U.S. 677 (1979). Because the private right of action is judicially implied, not granted by statute, the United States Supreme Court, in the case of Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998), addressed a remedial scheme that created a high standard for liability, congruent with the statutory enforcement framework of Title IX. In Gebser, which involved the sexual harassment of a student by a teacher, the Court rejected agency principles to impute liability to the school district for the actions of its teacher. Id. at 283. Also, the Court declined to hold the school district liable under a negligence standard for what it "should have known." Id. at 290. Instead, the Court held that the school district may only be liable for "an official decision...not to remedy the violation." Id. at 290. Specifically, the Court concluded as follows:

> [I]t would frustrate the purposes of Title IX to permit damages recovery against a school district for a teacher's sexual harassment of a student based upon principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school official... As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its program.
>
> *Id.* at 285[10]

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[9]In 1971, the provisions of Title IX were first introduced by Senator Bayh as an amendment to the Education Amendments of 1971, with a major feature being the Basic Education Opportunity Grant Program. Senator Bayn, speaking in support of the Senate Bill 659, which is now called Title IX, states as follows:

> The bill deals with equal access to education. Such access should not be denied because of poverty and sex. If we are going to give all students an equal education, women must finally be guaranteed equal access to education....[I]t does not do any good to pay out hundreds of millions of dollars if we do not see that the money is applied equitably to over half of our citizens.

117 Cong. Rec. 30412 (1971).

[10]To support its construction of Title IX, the Court contrasted the legislative purpose of Title IX with the intent of Title VII of the Civil Rights Act of 1964: "[W]hereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by

Based upon the enforcement framework of Title IX, the Supreme Court explained as follows: "The premise, in other words, is an official decision by the recipient not to remedy the violation...Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decisions but instead for its employees' independent actions." Id. at 290-91; see also Id. at 292 ("The issue in this case is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner.").

With even greater reluctance, in the case of Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), the United States Supreme Court addressed the standard of liability for Title IX in the context of student-on-student sexual harassment. The Court added additional safeguards to Title IX liability to limit damages for circumstances "only where the behavior is so severe pervasive, and objectively offense that it denies its victims the equal access to education that Title IX is designed to protect." Id. at 652. With respect to the effect of the relationship between the alleged "harasser" and the alleged "victim," the United States Supreme Court stated, "Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student sexual harassment." Id. at 653.

As Title IX has evolved, the United States Supreme Court has consistently recognized a high standard for liability to maintain Title IX's purpose of protecting students from institutionalized exclusion on the basis of gender. Therefore, the United States Supreme Court and the Third Circuit have held that Title IX should only be applied as a private cause of action in the clearest cases. *See* Davis, 526 U.S. at 652-653; Gebser 524 U.S. at 285-90; *see also* Bostic v. Smryna Sch. Dist., 418

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recipients of federal funding." *Id.* at 287.

F.3d 355, 360 (3d Cir.2005); Warren v. Reading Sch. Dist., 278 F.3d 163 (3d Cir.2002).

To prevail against the School District in their claim of student-on-student sexual harassment under Title IX, Plaintiffs must show that (1) the School District received federal funds; (2) sexual harassment occurred; (3) the harassment occurred under "circumstances wherein the [School District] exercised substantial control over both the harasser and the context in which the ....harassment occurred; (4) the [School District] had "actual knowledge" of the harassment; (5) the [School District] was "deliberately indifferent" to the harassment; and (6) the harassment was "so severe, pervasive and objectively offensive that it could be said to have deprived the victims of access to the educational opportunities or benefits provided by the school". Davis, 526 U.S. 629, 643.

Every claimant under Title IX must show that she or he was denied an educational benefit because of gender. "[Title IX] makes clear that, whatever else it prohibits, student must not be denied access to educational benefits and opportunities ***on the basis of gender.***" Davis., 526 U.S. at 643 *(emphasis added)*. "Title IX liability may arise when a funding recipient remains indifferent to severe, ***gender based*** mistreatment played out on a widespread level among students." *Id.* at 653 *(emphasis added)*.

In both Gebser and Davis, the court rejected the use of agency principles to impute liability to the District for the conduct of its teachers. Rather, [the court] concluded that the District could only be liable for damages when the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of harassment of which it had *actual* knowledge. Davis 526 U.S. at 642*(emphasis added)*.

1. The School District did not have "actual knowledge"

Actual knowledge is required for liability under Title IX: A school has actual knowledge if "an appropriate person at the institution has knowledge of the facts sufficiently indicating substantial danger to the student so that the institution can reasonably be said to be aware of the danger" Bostic 418 F.3d at 360.

To be liable under Title IX, the institution itself as the funding recipient, and not a third party, must have denied an individual the benefit of a program or activity. Davis at 640-641. Therefore, a school district can only be "liable for its own decision to remain idle in the face of known student-on-student harassment in schools." *Id.* at 641.

The notice must be so clear that the school's failure to act amounts to deliberate indifference. "Actual knowledge" must be "actual notice of discrimination in a recipient's programs." Gebser, 524 U.S. at 290. The response "must amount to deliberate indifference to discrimination....the premise, in other words, is an **official decision** by the recipient not to remedy the violations." *Id (emphasis added).*

The contrast between the Supreme Court cases of Davis and Gebser is instructive. In Gebser, the School District was sued under Title IX for a teacher's conduct of entering into a sexual relationship with an eighth grade student. The Court held that a teacher's conduct cannot be imputed to the school district under Title IX. Gebser at 274. The standard enunciated in Gebser is whether the recipient of federal funds is "deliberately indifferent to known acts of [sexual] misconduct." Davis 526 at 643; *cf.* Faragher v. City of Boca Raton, 524 U.S. 775, 791-792(1998)(imputing liability to the "employer" for actions of its agents for purposes of Title VII). In the Davis case, the Supreme Court held that the school district had actual knowledge sufficient for Title IX purposes

when a female victim told the building principal and two teachers when she was sexually harassed for many months by the same boy, a classmate.

"Appropriate Person"

Acknowledging that Title IX is basic scheme as a funding statute requires that the school have an opportunity to come into compliance, the court in Gebser and Davis held it necessary that an "appropriate person" have actual knowledge of the failure to comply. Gebser at 282; 20 U.S.C. §1682. This Circuit has held that a guidance counselor is not an "appropriate person" for the purpose of "actual knowledge". Warren, 278 F.3d at 173. An "appropriate person, such as a school principal" must have "[a]ctual notice" which amounts to "actual knowledge of discrimination in the recipient's program." Gebser at 290. The Supreme Court explained as follows:

> An "appropriate person" under [Title IX] is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination. Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official, who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond.
>
> Gebser, 524 U.S. at 290.

In the case of Warren, the Third Circuit Court of Appeals held that the School District did not have "actual knowledge" when only the guidance counselor, and not the principal, was informed of the student-on-student harassment. In the Warren case, a student and his mother sought damages for the conduct of Robert's fourth grade teacher, who played a "game" with the student that involved sexual contact. Plaintiffs told the guidance counselor about the incident. While the Third Circuit

agreed that a principal was an "appropriate person"[11], it held that there was nothing on the record to demonstrate that the guidance counselor "was cloaked with sufficient authority to be a 'responsible person' during any time relevant here." *Id.* When the case was before a jury for consideration, the federal court allowed the jury to find as fact whether the principal or guidance counselor was an "appropriate person" for Title IX purposes. The Third Circuit held that allowing the jury to render a finding regarding the authority of the guidance counselor as an "appropriate person" was an error that entitled the school district to a new trial because a guidance counselor, as a matter of law, lacks sufficient authority to be an appropriate person in this context. *Id.* At 173-174; *See also*, E.N. v Susquehanna Twshp. Sch. Dist., 2010 WL 4853700 *9(M.D.Pa.2010)(holding that a "school district could not be liable under §1983 for the guidance counselor's actions or inactions" *citing* Warren).

2. **There was no "deliberate indifference" by the School District**

Post Gebser and Davis over half of the Circuit Court cases where summary judgment was contested have upheld dismissal of the School Defendant on the basis that Plaintiffs could not meet the high standard ("clearly unreasonable") for "deliberate indifference".[12]

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[11] Subsequently, in the case of Bostic, the Third Circuit clarified that juries should not be instructed that a principal is, as a matter of law, an "appropriate person". *Id.* 418 F.3d at 362.

[12] Summary Judgment granted:
Santiago v. Puerto Rico, 655 F.3d 61, 74(1st Cir.2011)(holding that a failure to report to a higher authority does not constitute deliberate indifference); Sanches v. Carrollton Farmers Branch Indep.Sch.Dist., 647 F.3d 156, 169-70 (5th Cir. 2011)(explaining that the district's failure to follow its own policies does not constitute deliberate indifference); Watkins v. La Marque Indep. Sch. Dist., 308 Fed.Appx. 781, 784 (5th Cir.2009)(dismissing the plaintiff's claim because she could not show deliberate indifference where the school district investigated the claim, separated her from the perpetrator, and had an escort assigned to her); Johnson v. N.Idaho College, 350 Fed.Appx. 110, 112(9th Cir.2009)(holding that no reasonable juror could find deliberate indifference where there was a prompt investigation conducted and the alleged perpetrator of sexual harassment was forced to resign from teaching); Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch.Dist., 511 F.3d 1114, 1121-24 (10th Cir.2008)(affirming the district court's dismissal of the plaintiff's complaint on the basis of deliberate indifference where the school district conducted an investigation and determined that it could not discipline the alleged perpetrators); Ostrander v. Duggan, 341 F.3d 745, 751 (8th Cir.2003)(holding that, addressing student-on-student harassment, there was no deliberate indifference where a prompt and thorough investigation was done, even though the alleged perpetrators were not disciplined);Porto v. Town of Tewksbury, 488 F.3d 67, 72 (1st Cir.2007)(vacating judgment of jury in favor of plaintiff on the ground of

It is important to note that the private right of action only lies where the school district is deliberately indifferent to known acts of sexual harassment and the harasser is under the school's disciplinary authority. Davis at 633.[13] Where a school district does not engage in sexual harassment directly, it may not be liable for damages unless its deliberate indifference makes a student vulnerable to or causes them to undergo harassment. Davis at 644-645. Deliberate indifference to acts of peer sexual harassment arises only where the school district's response or lack of response to the harassment is *clearly unreasonable* in light of the known circumstances. *Id.* at 648; *see also* Doe v. Bellfonte Area School District, 106 Fed.Appx. 798 (3d Cir.2004)(*emphasis added*).

To establish deliberate indifference, a plaintiff must show "an official decision by the recipient [of federal funds] not to remedy the violations." Gebser, 524 U.S. at 290. School administrators receive substantial deference in cases of alleged student-on-student harassment; victims of harassment have no "right to make particular remedial demands." Davis 526 U.S. at 648. Particularly, "funding recipients are deemed 'deliberately indifferent' to acts of student-on-student

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deliberate indifference because the plaintiff could not show the school "did nothing" to address the claim, only that their measures were not effective); Escue v. N. Oklahoma College, 450 F.3d 1146 (10th Cir. 2006)(holding that there was no issue of material fact that the college was deliberately indifferent where the college removed the student from the environment and immediately questioned her peers about the charges, and it also determined not to allow the alleged perpetrator to teacher after the semester ended).

See also Doe ex re. Doe v. N. Allegheny Sch. Dist., 2011 WL 3667279 *9(W.D. Pa. August 2011)(holding thst deliberate indifference could not be shown when the evidence failed to support a finding that the administration agreed to "do nothing"); Velesky v. Aquinas Acad., 2011 WL 4102584(W.D.Pa. Sept. 14, 2011)(holding that there was no deliberate indifference when school took immediate action upon receiving knowledge).

Summary Judgment denied:

Contrast with Papelino v. Albany College of Pharmacy of Union Univ., 63 F.3d 81, 89-90 (2d Cir.2011)(finding material facts to support deliberate indifference where the dean testified that he kept quiet and did not want the sexual harassment allegations to become public); J.M. ex. rel. Morris v. Hilldale Indep. Sch. Dist., 397 F.Appx. 445, 453-54 (10th Cir.2010)(holding that there was an issue of material fact that the district was deliberately indifferent where the district did not take action due to the alleged victim's perceived lack of credibility).

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harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.* at 648-649. The Court in Dawn L. v. Greater Johnstown Sch.Dist., 586 F.Supp. 2d 332, 372 (W.D.Pa.2008) made clear that there is no cause of action for deliberate indifference to a *single* instance of one-on-one peer harassment, no matter how severe. *Id.* At 372.

In the present case, there is no evidence that the School District employees, *i.e.,* Haddon, Carter and Ceccatti, made an "official decision not to remedy" the alleged harassment or that their response was "clearly unreasonable" given what they knew. On the contrary, the record evidence establishes that immediate, reasonable steps were taken to address the known bathroom incidents. The individual incidents were responded to as follows:

1. (Junior Doe I)-

2. (Junior Doe III)- upon notice of the complaint, Carter, the Assistant Principal, had and his mother come into his office and look through the yearbook in an attempt to identify the other child involved.

[14]Plaintiff's expert, Dr. Edward Dragan, relies on unsworn statements of two teachers. This appears nowhere in sworn testimony and Haddon, Carter and Ceccatti deny any knowledge of the incident. Moreover, even if these statements are deemed to be a part of the record, the statements thereafter describe a reasonable response by the School District. The teacher claims she was interviewed the student and attempts were made to identify the alleged perpetrator by looking in a yearbook at pictures. The teacher was unable to identify anyone because the boy alleged to have been the perpetrator ran away from her. (N.T. Dragan 56-57).

identified as the other child involved. Carter throughly investigated this incident, interviewed , his mother, , his mother, and other students who were with on the date of the incident. Carter found alibi credible. Carter then went to the cafeteria the next day with in an attempt to identify the other child involved but was. was unable to do so. (Def. Brf. p. 6-8)

3. (Junior Doe V)-

4. (Junior Doe II) -

The same day, Ceccatti went to and interviewed her about what had happened, met with mother, also informed "administrators" and Dr. Lourdes Sanchez, the School Psychologist, Ceccatti met with to interview him regarding the incident,

called parents to discuss the incidents with them and called the Children and Youth caseworker.

The record indicates that the incidents were reported the same day. Accordingly, a bathroom restriction was placed on in response to both incidents. (Def. Brf. p. 10-12)

5. (Junior Doe IV)- The record evidence shows that after the incident with on March 16, 2004, the police came to the School and questioned , his father and other School District employees.

The Eastern District case of Brooks v. City of Philadelphia, 747 F.Supp.2d 477 (E.D.Pa.2010) is instructive here particularly on how "deliberate indifference" should be analyzed in a student-on-student Title IX harassment case. The facts in Brooks are remarkably similar to those in the present case and the legal theories of Title IX and State Created Danger are the same. In Brooks, the parents of a student brought an action against the School District and School principal

under Section 1983 and Title IX. They alleged that a kindergarten student touched the genitalia of the Plaintiff kindergarten student while the boys were in the bathroom together. The assistant teacher found the boys in the bathroom together. The assistant took the boys to the teacher and told her what happened. The School Principal then talked to both boys, contacted their parents and talked to the teacher to make sure that she escorted the children to the bathroom and they not be allowed in the same bathroom at the same time. Two days later, minor Plaintiff complained to the Assistant that the other boy had "bumped him on his behind" in the bathroom. The incident occurred while the boys were at lunch recess. The teacher notified the teacher and the principal. The School Counselor interviewed the boys. The minor Plaintiff told her that the other boy pulled down his pants and "humped" him by placing his genitalia on his back. In response, the Counselor notified both sets of parents, the Department of Human Services and referred minor Plaintiff for counseling. The parents contacted police and took minor Plaintiff to the hospital. Plaintiff's parents asked that he be transferred to another school and the principal complied. *Id.* at 479

The Defendants moved for summary judgment and the Court held that the District was not liable for student-on-student harassment under Title IX and the District's response to the incidents did not violate the minor Plaintiff's due process rights pursuant to a State Created Danger theory. The Court found that Title IX does not require funding recipients to remedy peer harassment but rather they must merely respond to known peer harassment in a manner that is clearly "not unreasonable". *Id.* at 482 *quoting* Davis at 648.

The Brooks Court opined that:

> ... "the fact that the principal's response [to the first incident] did not in fact prevent the second incident from occurring is not alone sufficient to demonstrate deliberate indifference for Title IX liability. Title IX does not require funding recipients to " 'remedy' peer

harassment and to 'ensure that...students conform their conduct to certain rules.'" "On the contrary, the recipient must merely respond to known peer harassment in a manner is not clearly unreasonable." Davis 526 629, 649, 119 S.Ct. 1661. The Supreme Court set forth in Davis that "this is not a mere reasonableness standard" and held that "in an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as 'clearly unreasonable' as a matter of law. *Id.*

Brooks at 482, *quoting* Davis

The response of the School District to all of the incidents were reasonable given the circumstances.

The response of the School District to the known[15] acts of sexual harassment on February 5, 2004, with were clearly reasonable. As set forth above, Ceccatti met with the students and talked to parents of both students and and called the Office of Children and Youth. The Principal, Haddon, and Assistant Principal, met with mother, Haddon contacted the

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school psychologist and mother, and met with them together. For the rest of the school year was allowed to use the single bathroom in the nurse's office. was put on a bathroom plan so that he "was not alone in the bathroom with children."(Def. Brf. p 8-12)

The response was also clearly reasonable to the incident with on March 16, 2004. After she was told of the bathroom incident, teacher escorted them to the principal's office, After the police were called by Plaintiff's parent. was immediately suspended from school after the incident and never returned

School personnel met with parents the next day and his parents asked that he be transferred to a different school. The School District complied with that request.

Plaintiffs' liability experts acknowledged that none of the actions taken in response to the known reports of bathroom misconduct were unreasonable. (N.T. Dragan 60-62, 64; N.T. Strauss 85-87, 90, 108). Rather, both defended what can only be termed as a negligence standard of responses that could have been made, but weren't, or methods the experts felt were shoddily applied. (N.T. Dragan 60-64; N.T. Strauss 85-87, 90, 108).

This negligence standard is precisely the standard the court holds as inappropriate to determine deliberate indifference in a Title IX case. Davis 526 U.S. at 648; Gebser 524 U.S. at 290.

The actions of the School District in response to the known acts of sexual harassment cannot be considered deliberate indifference in accordance with the standard set forth by the United States Supreme Court in Davis. Accordingly, Plaintiffs' claims under Title IX against Defendant

Allentown School District should be dismissed.

3. **Deprivation of educational program**

In contrast to the harm required to sustain causes of action in tort or even under Title IV and VII, Title IX requires a special type of harm as an essential element of a cause of action for educational harm. For student-on-student harassment to be actionable under Title IX, there must be a deprivation of a student's educational program, it must have a "systemic effect" and must be both severe and pervasive.

The Court in Davis analyzed the standard for deprivation of education program under Title IX:

> "Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," Oncale v. Sundowner Offshore Services, Inc., 523 U.S.75, 82, 118 S.C.t 998, 140 L.Ed.2d 201 (1998), including, but not limited to, the ages of the harasser and the victim and the number of individuals involved, see OCR Title IX Guidelines 12041-12042. Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in an manner that would be unacceptable among adults.... Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."
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> Davis at 651-652.

The Davis Supreme Court specifically stated that a single incident, no matter how severe, could not result in the type of conduct actionable under Title IX: Although in theory, a single incident of sufficiently severe...harassment could...have such an effect," it was "unlikely that Congress would have thought such behavior sufficient...in light of the inevitability of student misconduct and the amount of litigation that would thereby be invited..." Davis, 526 U.S. at 652-

53[16]. Claims of harassment under Title IX are, in effect, claims for the creation of a "hostile [educational] environment." Saxe v. State College Area Sch. Dist., 240 F.3d 200, 206 (3d Cir.2001). The concept of hostile environment originated in employment in employment claims under Title VII, where it was characterized as "harassment so severe or pervasive as 'to alter the conditions of the victim's employment and create an abusive working environment.'" *Id.* quoting Meritor Savings Bank v. Vinson, 477 U.S. 51, 67, 106 S.Ct. 2399 (1986). Similarly, in a claim for student-on-student sexual harassment under Title IX the "plaintiff must establish sexual harassment that is severe, pervasive and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." Davis 526 U.S. at 651 *citing* Meritor at 67. To do so the plaintiff need not show "physical exclusion" but must present evidence of more than "teasing and name-calling." Davis at 651-652. In addition to showing that the harassment was severe and pervasive, Title IX claimants must show that the harassment had "the systemic effect of denying the victim equal access to a program or activity." *Id.* at 652-53.

The Davis case emphasized that, to be actionable under Title IX, the harassment must provide a barrier to the victim's educational program:

> The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing female students from using a particular school resource–an athletic field or a computer lab, for instance.

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[16]Although both Title VII and Title IX have many common threads, one main difference is that a single advance, no matter how severe, cannot "deprive" a student of an education program. In contrast with Title VII liability, Title IX jurisprudence does not recognize claims based upon " single unwelcome physical advance". Dawn L., at 372 n.59. The Supreme Court noted this difference in the Davis opinion and explained that "Title IX prohibits official indifference to known peer harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored." Dsvis, 526 U.S. at 653.

> District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the fact of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages. It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an education opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victim-students are effectively denied equal access to an institutions' resources and opportunities.

Davis 526 U.S. at 650-651; *Cf.* Meritor Savings Bank 477 U.S. 57 at 67.

An analogous example is provided in the case of Dawn L. 586 F.Supp. 2d at 332, 372, where the Plaintiff was repeatedly harassed in the bathroom by another female student in the girl's bathroom and was also sent harassing notes on multiple occasions. The Court stated that the following constituted a deprivation of educational program:

> This physical exclusion, which lasted from January 21, 2005 until March 15, 2005, was a clear denial of M.L.'s right of equal access to the District's resources and opportunities. M.L. received no tutoring between January 21, 2005 and February 10, 2005, when her homebound instruction was to begin. When her tutor, Raymond Zonin, did show up he arrived late and left early, never providing even the five instructional hours per week that the District required. Such instruction as Zonin did provide was inadequate at best, merely repeating lessons already learned when not simply ignoring the curriculum established by the District, and at no time did Zonin supply the type of enrichment mandated by M.L.'s GIEP.

Id. at 373.

The Davis also emphasized that the harassment **must have a "systemic effect"** of denying equal access to the educational program:

> "Moreover, the provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought

> such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment...
>
> ...The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment."

Davis at 653.

The Court in Davis stated that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." Davis at 648 *citing* New Jersey v. T.L.O. 469 U.S. 325, 342-343, n.9 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

In this case as outlined on pages 16 through 19 of this brief, evidence of any real educational harm for any of these plaintiffs is absent from the record. No plaintiff was excluded from school. No plaintiff excluded himself from school. No plaintiff was denied tutoring and there is no competent evidence that anyone's school performance suffered as a result of these incidents. Rather, the record evidence shows that whatever issues may have had before the incidents they continued to have after the incidents. Their academic performance remained pretty constant.

Plaintiffs' experts, unable to point to any specific educational loss, can only speculate that the mild symptomatology described by their counselor must have affected their concentration. It is suggested that this theoretical educational impediment does not reach the level of educational harm contemplated in Davis.

Clearly this is one of those cases in which that court should be cognizant of the day-to-day challenges of educators as they make real time decisions to deal with a constant stream of the unexpected. Accordingly, Plaintiffs' claims under Title IX should be dismissed.

B. PLAINTIFFS FAIL TO ESTABLISH A CLAIM UNDER SECTION 1983

Plaintiffs raise a constitutionally based §1983 claim stemming from their allegations that Defendants ASD, Haddon, Carter and Ceccatti were deliberately indifferent to and callously disregarded their constitutional rights to bodily integrity guaranteed under the the Due Process Clause of the Fourteenth Amendment. (Third Amended Complaint ¶75). Essentially, Plaintiffs claim that the School District had a practice, custom or policy of deliberate indifference to the Plaintiffs' constitutional rights by unreasonably and unconstitutionally failing to report alleged sexual assaults. (Comp. ¶75).

The substantive component of the Due Process Clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." Gottlieb v. Laurel Highlands Sch. Dist., 272 F.3d 168, 172 (3d Cir. 2001). Only state conduct that is "arbitrary, or conscience shocking, in a constitutional sense"rises to this level. County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998). Notwithstanding the theories of Plaintiffs' liability experts that more could have been done, it can hardly be said that the school's response to what at the time seemed isolated incidents, would be so lacking or misguided as to "shock the conscience".

Following the Court's decision on Defendants' 12(b)(6) motion, the only remaining cause of action was a State Created Danger theory under the Fourteenth Amendment Due Process Clause. In the Court's opinion of September 27, 2007, the Court thoroughly discussed the limitations of such a claim when the underlying facts involve a harm visited upon a non-state actor by another non-state

actor, in this case student on student. The Court identified that applicable Third Circuit precedents: Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir.1989); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992); Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996); Bright v. Westmoreland County, 443 F.3d 276 (3d Cir.2006). Most significantly in the analysis is the Court's recognition of the test set forth by the Third Circuit in Bright for the state-created danger theory. The Third Circuit held that in order to bring a claim under the state-created danger theory, a plaintiff must establish the following elements:

> (1) the harm ultimately caused was foreseeable and fairly direct;
> (2) a state actor acted with a degree of culpability that shocks the conscience;
> (3) a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or a "member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general; and
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.
>
> Bright 443 F.3d at 281.

The Court opined[17] that "the crucial question in dispute is whether any of the state actors named as defendants in this case took an affirmative action... to render Junior Doe and the other minor-plaintiffs more vulnerable than they would have been had the state not acted at all." (Opinion p.6).

With respect to Plaintiffs' claims under Section 1983, the Court stated, "As the case proceeds through discovery, plaintiffs' counsel must focus on discovering what actions the defendants took, rather than on what actions they failed to take, if they intend their claims in Count I to survive a

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[17]These statements were made in Judge Golden's opinion of September 21, 2007, on Defendants' Motion to Dismiss. Docket no. 79

motion for summary judgment." (Opinion at p. 11).

The Bright test, like the Davis test for liability under Title IX, emphasizes the need for evidence of co-mission rather than omission.

While as a general rule, a school district is not constitutionally liable for harm inflicted on students by other students, a school will held liable for affirmative action that renders students more vulnerable to harm than they would have been had the school not acted at all. Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 (1993). Even "indefensible passivity" by school officials will not create a constitutional violation. D.R., 972 F.2d at 1376. The Third Circuit has stated: "It is a misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause." Bright 443 F.3d at 282.

Plaintiffs arguments are informed by their educational experts' theories that the steps that ASD took in response to all of the bathroom incidents were insufficient or misdirected. However, Plaintiffs' experts do not contend that any of the actions taken were "unreasonable", much less "clearly unreasonable". (N.T. Dragan p. 60-62, 64).

Even viewing the record in a light most favorable to the Plaintiff demonstrates only that this single incident with . was a result, at worst, of inadvertence or oversight. It has consistently been held that deliberate indifference requires a knowing act on the part of the state actor. Negligence and sometimes recklessness is not sufficient to rise to the conscious shocking level of deliberate indifference. County of Sacramento 523 U.S. at 853-854.

The incident with was the result of a "perfect storm" of occurrences - the unplanned suspension and placement of in the detention hallway when his mother could not pick him up from school prior to the early dismissal; the variation from the normal procedure of the 1st grade group bathroom trips that occurred in the chaos of preparation for early dismissal because of the mid-day snow storm; the disruptive behavior of in the detention hallway that had him placed just around the corner from the rest of the detention students; and the odd configuration of the hallway leading to the ground floor boys bathroom.

It is true that Jerald Brown was not told that was on a bathroom plan. (N.T. Brown 69). Nevertheless, the circumstances of that day, and the close but odd configuration of the detention area, along with the temporary status of . in the detention area, could easily explain why the Assistant Principal did not think to inform the detention teacher about bathroom plan. Moreover, there is no assurance that had Brown known of restrictions that he would have acted any differently. Brown testified that although he could see around the corner, he did not see either or enter the lavatory. (N.T. Brown 84).

The Third Circuit case of D.R., is analogous to the instant case. In D.R., the incidents took place in the darkroom and unisex bathroom located in the students' graphic arts classroom. The plaintiffs, all young females, were alleged to have been repeatedly raped, forcibly molested, and otherwise abused sexually and physically by boys in their classroom. All of the acts of abuse occurred when the boys drug and forced the girls into the unisex bathroom or darkroom during the graphic arts class. The classroom teacher was unaware of the acts but admittedly had little control over the classroom. The students sued the school and the teacher for, among other things, a due process violation via State-Created Danger. *Id.* at 1375

The plaintiffs alleged that the unisex bathroom and darkroom created the danger. The Third Circuit held that neither the bathroom or the darkroom created a danger because of the following: "Bathrooms are generally equipped with inside locks for privacy purposes and obviously, the same room was not intended to be used by both sexes at the same time. The existence of the darkroom and of a single restroom, both contained within the high school classroom, did not subject plaintiffs to an inherently dangerous situation." *Id.* at 1375.

The plaintiffs also alleged that the school district created a danger by "indefensible passivity...[O]ne school defendant was advised of the misconduct and did not investigate." The Third Circuit held that this shows "nonfeasance but they do not rise to a constitutional violation." *See also* DeShaney, 489 U.S. at 203 ("The most that can be said of state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them."). In conclusion, the Third Circuit stated that "plaintiffs' allegations are insufficient to show, as required by DeShaney, that the school defendants either impermissibly limited the freedom of the plaintiffs to act on their own behalf, or barred their access to outside support. Nor do they demonstrate that the defendants violated a constitutional duty by creating or exacerbating that danger posed by the student defendants." *Id.* At 1376.

1. INDIVIDUAL DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY

Plaintiffs also claim that Principal Dr. Eva Haddon, Assistant Principal Carter and Guidance Counselor Ceccatti are individually liable under Section §1983.[18] To establish a Section 1983 claim

[18]Plaintiff's claim against Haddon, Carter and Ceccatti in their official capacity should be treated as a claim against ASD, as ASD is the real party in interest. A.M. v. Luzerne County Juvenile Detention Center, 372 F.3d 572, 580 (3d Cir.2004)("A suit against a governmental official in his or her official capacity is treated as a suit against the governmental agency itself."); Irene B. V. Philadelphia Acad. Charter Sch., No. 02-1716, 2003 WL 24052009 at *9 (E.D.Pa.2003)("Since official capacity suits generally represent only another way of pleading an action against an

against these individuals, Plaintiffs must "demonstrate a violation of a right protected by the Constitution or laws of the United States that was committed by a person acting under the color of state law." Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000). For purposes of this argument only, Defendants concede they acted under color of state law.

All claims against Haddon, Carter and Ceccatti in their individual capacities should be dismissed against them because they are entitled to qualified immunity. "Qualified immunity, as the Supreme Court has explained, is the principle that 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Walter v. Pike County, Pa., 544 F.3d 182 (3d Cir. 2008)(*quoting* Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). In short, qualified immunity shields Defendants from personal immunity if they "reasonably believed that his conduct complied with the law." Pearson v. Callahan, 129 S.Ct. 808, 172 L.Ed. 2d 565 (2009).

The Supreme Court has provided (but no longer mandates[19]) a two-step inquiry to determine whether government officials are entitled to qualified immunity:

> First, a court must decide whether the facts that a plaintiff has alleged make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.

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entity of which the officer is an agent, it is appropriate to dismiss the claims against the individual in his official capacity and retain them against the real party in interest."

[19]In Pearson, the Court specifically held "while the [two-step] sequence is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson, at 236, 129 S.Ct. 808.

The factual background in this case must be put in perspective. Prior to February 5, 2004, *no one*, not any classroom aides, not parents, not children, had told any ASD administrators of any incidents of harassment wherein they identified the perpetrator as . was not identified by anyone as being involved in any alleged bathroom incidents until the incidents with As soon as Administrators learned of the bathroom complaints and was identified on February 5, 2004, Ceccatti immediately began to investigate the complaints, meet with the parties involved and put on bathroom restrictions. Ceccatti also advised the parents of the alleged victims, the parents of , the School Psychologist, the Office of Children and Youth caseworker and some School Administrators of the complaints. Carter was involved only in the incident. Carter informed Ceccatti about the incident after brought both to his office and both he and Haddon met with mother. Haddon was also involved in the incident. Haddon contacted the School Psychologist and met with mother. Notwithstanding the characterizations made by Plaintiffs, it is clear that the District was attempting to address the incidents in the bathrooms

Plaintiffs have not brought forth any evidence which would show that Haddon, Carter and Ceccatti should not be entitled to qualified immunity. As argued throughout, it is not difficult to understand that the isolated, non-repeated or targeted incidents over a period of three to four months would not raise a suspicion of Title IX implications for a reasonable educator. The record evidence shows that these complaints were immediately investigated and reasonably addressed. Thus, Haddon, Carter and Ceccatti should be dismissed from this case.

Accordingly, whether analyzed as a failure of the record to establish triable facts for individual liability under Section 1983 or under qualified immunity, the case against Defendants Haddon, Carter and Ceccatti should be dismissed.

IV. CONCLUSION

Defendant's Motion for Summary Judgment for both remaining claims of due process violation and Title IX violation should be granted as to all remaining Defendants and against all Plaintiffs.

KING, SPRY, HERMAN, FREUND & FAUL, LLC

/s/ John E. Freund, III
John E. Freund, III, Esquire
One West Broad Street, Suite 700
Bethlehem, PA 18018
610.332.0390
ID No. 25390
jef@kingspry.com

F:\Users\KingSpry Clients\A\ALLENTOWN SCHOOL DISTRICT\DOE, Junior-11662\Pleadings\BRF-SJ.wpd